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No. 83-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

A. E. STALEY MANUFACTURING COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR CERTIORARI SHOWING THAT *EEOC V. SHELL OIL COMPANY*, No. 82-825, DOES NOT CONTROL THIS CASE

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Supplemental Questions Presented for Review

1. Is a charge which is so broad and expansive as to amount to no more than a charge that the employer has violated Title VII of the Civil Rights Act valid?

2. Must an employer have notice of the nature of the circumstances constituting its "believed" violation of Title VII of the Civil Rights Act for the EEOC to have jurisdiction to issue a subpoena calling for documents supposedly "relevant" to the sworn "believed" violation?

3. May an employer challenge the validity of a Commissioner's charge of systemic discrimination on the ground that the charge does not show that it satisfies the EEOC's "criteria" for the issuance of such charges?

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May it please the Court:

Petitioner sought to have this case heard in conjunction with *EEOC* v. *Shell Oil Company*, 82-825. That did not occur. But the Court, thus far, has withheld disposition of the petition. On April 2, 1984 *Shell* was decided against some of petitioner's contentions here. Therefore, this supplement is proffered to show that disposition of *Shell* in favor of EEOC does not mean this case should be decided similarly because:

1. The charge here is far broader and at the same time much less informative than the one in *Shell*. In *Shell*, the Court noted that Shell" * * * understood from the outset the charge was based upon statistical manifestations of discrimination derived from the annual reports filed by respondent with the

Commission." (*Shell*, 52 L.W. 4401 n.6.). And Shell knew that a dispute existed as to the relevant employment market against which its own statistics were to be measured. (*Shell*, dissent, 52 L.W. at 4409).

But in the case at bar, Staley does not know to this day why it was selected for a charge, and, if it be assumed that the Commissioner consulted the Commission's "Criteria for Selecting Companies for Major Pattern and Practice Cases" (App. to Pet., 69a) which, if any, of the "standards," the Commissioner may have believed applied. So far as Staley is informed, it is a mere guinea pig selected for vivisection is a theoretical experiment as to how well Title VII is honored in central Illinois.

Moreover, the charge at bar (App. 20a) is far broader than the one in *Shell:*

It charges that Staley discriminated against blacks and women in *all* blue-collar positions, denying them "the opportunity to work in *all* blue-collar departments; failing to provide blacks and women with "opportunities" for promotion, assignment and training. (App. 20a-21a) In sum, because the charge is all embrasive it can fairly be said that Staley would have been as fully informed if the Commissioner had charged outrightly and blankly, "Staley violated and violates Title VII of the Civil Rights Act." But the *Shell* opinion holds that such a hypothetical charge and notice would be insufficient because:

> "Such a result would be inconsistent with the evident purpose * * to encourage complainants to identify with as much precision as they can muster the conduct complained of. And it would render nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant to a charge.'" (*Shell*, 53 L.W. at 4404).

The Court is faced with the fact that the lengthy accusations of the charge here go so far as to be no more than a general claim that Staley has violated virtually every proscription of Title VII. We suggest, that in other fields the Court would not permit such a monstrosity by a police seargant. Does *Shell* authorize it?

An example of the vicious uncertainty but sweeping accusatory nature of the instant charge is that in specification No. 2 (App. 21a) it says Staley "[restricts] and/or [excludes]" blacks and women from "*all* blue-collar positions." The blatant falsity of the first alternative of that indictment is demonstrated by specification No. 5 which claims that Staley "*terminates*" women in disproportionate numbers. Discharges women it never hired?

Surely, the Court should hear the case and rule that due process, the statute and the regulations require that high federal functionaries deal with citizens more fairly and frankly than that.

2. The charge at bar (App. 21a) accuses Staley of maintaining a seniority system in the collective bargaining agreement which operates to "perpetuate" the effects of Staley's discriminatory policies. (App. 21a) This is not a charge that the seniority system itself is discriminatory; it is not a charge that the collective bargaining agreement is not *bona fide*. As shown by the Petition for Certiorari, a *bona fide* seniority system that merely perpetuates alleged discrimination is not unlawful. (*American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). No such seniority system problem existed in *Shell*. The charge here, so far as it alleges a seniority system perpetuation of discrimination is, therefore, invalid on its face. (The charge was issued prior to *American Tobacco*). The Court should speak to this issue.

3. And there is the matter of limitations: Staley made a sworn showing that it had recruited no applicants for permanent blue-collar employees since March 3, 1980, nor had any employees been accepted into any apprenticeship training program covered by the collective bargaining agreement since prior to March 3, 1980. Staley also showed that it had a discharged no female blue-collar workers after March 30, 1980. (App. 63a) Unless those showings can gratuitously be denigrated as perjury, none of the discriminatory acts claimed in the

charge, could have occurred within 180 days of its issuance. The charge is tolled by the statute's 180-day limitation period. No such issue was presented in *Shell.*

The *Shell* opinion cannot be without boundaries or limitations. Yet it can be read as conferring upon the EEOC the roving inquisitorial power that the Federal Trade Commission in fact possesses (See *U.S. V. Motron Salt Co.*, 338 U.S. 632, 642). It would seem that the Court does not intend to go that far because it quotes (52 L.W. at 4402) the "Interpretative Memorandum" of Senators Clark and Case that "*** the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission." This case can determine the boundaries of *Shell's* language.

The propositions which we suggest are worthy of full briefing and argument. The undersigned are not satisfied that they have properly stated the Supplemental Questions Presented for Review in the light of *Shell.* Time is needed to investigate them adequately. So called "systemic investigations" are time-consuming and expensive for employers. The Commission should not be allowed to harass employers with such burdens unless there is some plausible showing as to why it should.

Congress withheld from the Commission the power to enforce its own subpoenas. It did not intend that the federal courts rubber-stamp every subpoena issued by an overzealous agency.

We understand that a grant of the writ will put ultimate disposition of this case into the next term. But the questions are fundamental. Meanwhile no harm will be done because Staley in fact does not discriminate. (See Staley's "Statement of Position (submitted pursuant to the Commission's procedures.)) (App. 51a et seq.)

Respectfully submitted,

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